Yong Moi Sin v Kerajaan Malaysia & Anor

HIGH COURT (JOHOR BAHRU) — CIVIL APPEAL NO 12-14 OF 1995
ABDUL MALIK ISHAK J
1 OCTOBER 1999

Criminal Procedure *— Arrest — Scope of police's power to arrest — Seizable offence — Reasonable suspicion to arrest appellant — Whether arrest legal — Illegal search by police — Whether amount to unlawful imprisonment and criminal trespass — Criminal Procedure Code s 62*

A police report was lodged by one Arunachalam regarding a robbery on 1 February 1993 involving jewellery items including a gold locket. The suspects were arrested and, through them, the police came to know that the gold locket was sold to a company owned by one Khoo Siew See ('Khoo'). Khoo admitted selling the gold locket to Yuan Dong Jewelleries, a company owned by the appellant. On 15 February 1993 at 5.30pm, a police party headed by the second respondent proceeded to Yong Duan Jewelleries and carried out the necessary investigations under s 411 of the Penal Code. The second respondent requested the appellant to open a steel safe that was purportedly used to keep the stolen gold locket but the appellant could not accede to the request because according to him the steel safe could not be opened until 9.00am the next day. The appellant also informed the second respondent that no one could open the steel safe except himself. The appellant was then taken to the police station and detained there for the night. The next day, the appellant was again taken to his factory under police escort for the purpose of opening the steel safe. He was handcuffed. The steel safe was duly opened and the gold locket was not found therein. The appellant was then released on a bail bond. From the facts of the present appeal, there were strict compliance with three of the ingredients of s 62 of the Criminal Procedure Code. However, two ingredients were not complied with, ie the list of property that was alleged to be stolen was not delivered to the appellant nor was the list produced in writing with a declaration to the effect that the gold locket had been stolen and the informant (Khoo) had good grounds for believing that the property was deposited in the appellant's premises and the complainant was not present during the search. The appellant alleged that between 15 February 1993 to 16 February 1993, the respondents had committed criminal trespass, false imprisonment and had defamed the appellant and claimed for damages. The sessions court dismissed the appellant's claim. The appellant appealed. The issues before the court were: (i) whether the appellant was legally arrested; (ii) was there unlawful imprisonment and criminal trespass occasioned by the second respondent; and (iii) was the search without warrant proper in the circumstances.

Held, dismissing the appeal:

(1) The appellant was concerned in a seizable offence as offence under s 411 of the Penal Code. A reasonable complaint in the

form of a police report was made and credible information pertaining to the gold locket was provided by Khoo which information linked the appellant to the gold locket. In the mind of the second respondent, a reasonable suspicion existed as to the role of the appellant in the whole episode. There was thus sufficient basis for the second respondent to arrest the appellant and that arrest was legally effected within the provisions of the Criminal Procedure Code (see p 53D–F).

(2) Since the appellant was legally arrested, the detention of the appellant was likewise lawful and consequently there was no unlawful imprisonment nor criminal trespass occasioned by the second respondent (see p 54G).

(3) Based on authorities, the fact that the evidence was illegally obtained would not affect the question of its admissibility. Further, an illegal search by the police can never be construed to be a criminal trespass and the police would not be guilty of it. An illegal search, in the context of the present appeal, can never give rise to an unlawful imprisonment. The appellant was detained for 15 hours and there was no necessity to produce him before a magistrate for detention under s 117 of the Criminal Procedure Code (see p 56B–C, E–F).

(4) The power to search must go hand in hand with the power to investigate. That being the case, when the second respondent took the appellant who was reasonably suspected of committing an offence under s 411 of the Penal Code to the appellant's factory, that was the right course of action for the second respondent to take. There was evidence emanating from the second respondent that gold items can easily be melted away so as to avoid detection. It was to prevent vital evidence from disappearing that the search was conducted without a search warrant. The second respondent was justified in doing so by virtue of s 62 of the Criminal Procedure Code (see pp 56G–H, 57A–C).

(5) No inference should be drawn against a party for not producing a material witness where the question of the absence of such witness was not raised at the trial at all. The absence of the complainant of the police report was not raised at all before the sessions court and so it was too late in the day for the appellant to raise the issue of adverse inference in the appeal. It was not legitimate for the appellate court to draw an adverse inference against the respondents for the failure of calling the complainant of the police report (see p 54B–C).

[Bahasa Malaysia summary

Satu laporan polis telah dibuat oleh seorang bernama Arunachalam berhubung dengan satu rompakan pada 1 Februari 1993 yang melibatkan barangan kemas termasuk seutas loket emas. Mereka yang

A disyaki telah ditangkap dan, melalui mereka, pihak polis telah mengetahui bahawa loket emas tersebut telah dijual kepada sebuah syarikat yang dimiliki oleh seorang bernama Khoo Siew See ('Khoo'). Khoo mengakui telah menjual loket emas tersebut kepada Yuan Dong Jewelleries, sebuah syarikat yang dimiliki oleh perayu. Pada 15 Februari 1993 jam 5.30 petang, sepasukan polis yang diketuai oleh B responden kedua telah menuju ke Yong Duan Jewelleries dan menjalankan siasatan yang perlu di bawah s 411 Kanun Keseksaan. Responden kedua meminta perayu untuk membuka peti besi yang dikatakan telah digunakan untuk menyimpan loket emas yang dicuri itu tetapi perayu tidak menyetujui permintaan itu kerana, menurut C beliau, peti besi itu tidak boleh dibuka sehingga pukul 9.00 pagi keesokan harinya. Perayu juga telah memaklumkan kepada penentang kedua bahawa tiada siapa yang boleh membuka peti besi itu kecuali beliau. Perayu kemudiannya telah dibawa ke balai polis dan ditahan di situ semalaman. Keesokan harinya, perayu sekali lagi telah dibawa ke kilang beliau di bawah kawalan polis bagi tujuan membuka peti besi D itu. Beliau telah digari. Peti besi itu dibuka akhirnya dan loket emas tersebut tidak dijumpai di situ. Perayu kemudiannya telah dibebaskan dengan bon jaminan. Berdasarkan fakta-fakta rayuan ini, terdapat pematuhan tegas kepada tiga unsur s 62 Kanun Acara Jenayah. Walau bagaimanapun, dua unsur tidak dipenuhi, iaitu senarai barang yang didakwa telah dicuri tidak diserahkan kepada perayu maupun senarai E itu dikemukakan secara bertulis bersama satu deklarasi bagi tujuan tersebut bahawa barangan kemas itu telah dicuri dan pemberitahu (Khoo) mempunyai alasan baik untuk mempercayai bahawa barangan itu telah disimpan di dalam premis perayu dan pengadu tidak hadir semasa geledahan tersebut. Perayu mendakwa bahawa antara 15 Februari 1993 hingga 16 Februari 1993, responden-responden F telah melakukan pencerobohan jenayah, penahanan salah dan telah memfitnah perayu dan menuntut ganti rugi. Mahkamah sesyen menolak tuntuan perayu. Perayu membuat rayuan. Isu-isu yang dihadapkan ke mahkamah adalah: (i) sama ada perayu telah ditahan secara sah; (ii) adakah wujud penahanan dan pencerobohan jenayah tidak sah yang disebabkan oleh responden kedua; dan (iii) adakah G geledahan tanpa waran betul di dalam keadaan tersebut.

Diputuskan, menolak rayuan tersebut:

(1) Perayu terlibat di dalam satu kesalahan boleh tangkap iaitu kesalahan di bawah s 411 Kanun Keseksaan. Satu aduan H munasabah di dalam bentuk satu laporan polis telah dibuat dan maklumat yang boleh dipercayai berhubung dengan loket emas tersebut telah diberikan oleh Khoo di mana maklumat itu mengaitkan perayu dengan loket emas tersebut. Di dalam pemikiran responden kedua, satu rasa syak yang munasabah wujud berhubung dengan peranan perayu di dalam keseluruhan I episod ini. Oleh demikian, terdapat asas yang mencukupi untuk responden kedua menangkap perayu dan penangkapan itu telah sah dilakukan menurut peruntukan Kanun Acara Jenayah (lihat ms 53D–F).

(2) Memandangkan perayu telah ditangkap di sisi undang-undang, penahanan perayu juga adalah sah dan selanjutnya tiada penahanan yang menyalahi undang-undang atau pencerobohan jenayah dilakukan oleh responden kedua (lihat ms 54G).

(3) Berdasarkan autoriti-autoriti, fakta bahawa keterangan yang telah diperolehi menyalahi undang-undang tidak akan menjejaskan persoalan kebolehterimaannya. Tambahan pula, satu geledahan yang menyalahi undang-undang oleh pihak polis tidak boleh ditafsirkan sebagai satu pencerobohan jenayah dan pihak polis tidak akan didapati bersalah atas sebab tersebut. Satu geledahan yang menyalahi undang-undang, di dalam konteks rayuan ini, tidak mungkin boleh disifatkan sebagai satu penahanan yang tidak sah. Perayu telah ditahan selama 15 jam dan tiada keperluan untuk beliau dikemukakan di hadapan seorang majistret untuk penahanan di bawah s 117 Kanun Acara Jenayah (lihat ms 56B–C, E–F).

(4) Kuasa untuk mengeledah mestilah selaras dengan kuasa penyiasatan. Jika ia adalah sedemikian, apabila responden kedua telah membawa perayu yang telah dengan munasabah disyaki melakukan kesalahan di bawah s 411 Kanun Keseksaan ke kilang perayu, ia merupakan tindakan betul yang telah diambil oleh responden kedua. Wujud keterangan yang datangnya daripada responden kedua bahawa emas tersebut boleh dengan senang dileburkan bagi mengelakkan pengesanan. Geledahan yang dilakukan tanpa waran itu adalah untuk mengelakkan keterangan penting daripada hilang. Responden kedua mempunyai alasan yang kuat berbuat demikian menurut s 62 Kanun Acara Jenayah (lihat ms 56G–H, 57A–C).

(5) Tiada inferens boleh dibuat terhadap satu pihak yang tidak mengemukakan saksi utama di mana persoalan ketidakhadiran saksi tersebut tidak dibangkitkan langsung di dalam perbicaraan itu. Ketidakhadiran pengadu kepada laporan polis tersebut tidak timbul langsung di mahkamah sesyen dan oleh itu adalah terlalu lewat untuk perayu menimbulkan isu kesimpulan yang bertentangan di dalam rayuan itu. Adalah tidak sah bagi mahkamah rayuan untuk membuat inferens yang bertentangan terhadap responden-responden kerana kegagalan memanggil pengadu kepada laporan polis tersebut (lihat ms 54B–C).]

Notes

For cases on scope of police's power to arrest, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 537–538.

Cases referred to

Aludomal v Emperor 17 Cr LJ 87 (refd)
Banwari v Mohesh 45 IA 284; 24 CWN 577 (refd)

Beckwith v Philby 6 B & C 635 (refd)
Central Jail, Lashkar AIR 1950 MB 83 (refd)
Charu Chandra AIR 1917 Cal 253 (refd)
Christie & Anor v Leachinsky [1947] AC 573 (refd)
Dallison v Caffery [1964] 2 All ER 610 (refd)
Davis v Russell 5 Bing 354 (refd)
Elias v Pasmore [1934] 2 KB 164 (refd)
Emperor v Madar (1885) All Co N 59 (refd)
Fox v Gaunt 3 B & Ad 798 (refd)
Harbansingh Sardar Lanasingh v State AIR 1970 Bom 79 (refd)
Hashim bin Saud v Yahaya bin Hasim & Anor [1977] 1 MLJ 259 (refd)
Hogg v Ward 27 LJ Ex 443 (refd)
Jagadishprasad v S AIR 1970 Bom 166 (refd)
KN Cheriyon v Johnson (1969) Mad LJ (Cr) 765 (refd)
Kuruma v R [1955] 1 All ER 236 (refd)
Mahadev Rai v King-Emperor AIR 1924 All 201 (refd)
Mahmood v Government of Malaysia & Anor [1974] 1 MLJ 103 (refd)
Marsh v Loader 14 CBNS 535 (refd)
Paramhansar v State AIR 1964 Ori 144 (refd)
PP v Johari bin Abdul Kadir [1987] 2 CLJ 66 (refd)
PP v Seridaran [1984] 1 MLJ 141 (refd)
PP v Tan Seow Chuan [1985] 1 MLJ 318 (refd)
R v Inwood [1973] 2 All ER 645 (refd)
R v Walker 23 LJMC 123 (refd)
Ramly & Ors v Jaffar [1968] 1 MLJ 209 (refd)
Roshan Beevi v Joint Secretary of Tamil Naidu (1984) Cr LJ 134 (Mad) (refd)
Saw Kim Hai & Anor v Reg [1956] MLJ 21 (refd)
Shaaban & Ors v Chong Fook Kam & Anor [1969] 2 MLJ 219 (refd)
Spicer v Holt [1976] RTR 389 (refd)
Srichand v S, A [1967] SCC 450 (refd)
State of Assam v Upendra Nath Rajkhown (1975) Cr LJ 354 (Gauhati) (refd)
Tan Eng Hoe (petitioner), In the matter of the petition of right of v The Attorney General of the Straits Settlements [1933] MLJ 15 (refd)
Tan Kay Teck & Anor v The Attorney General [1957] MLJ 237 (refd)
Timothy v Simpson 1 Cr M & R 757 (refd)
U Thwe v A Kim Fee AIR 1930 Rang 131 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 2(i), 15(i), 23, 62, 108(2), 117
Evidence Act 1950 s 114(g)
Penal Code s 411

Mohamed Hanipa bin Maidin (*L Pathiban & Associates*) for the appellant.
Rosli Kamaruddin (Federal Counsel) for the respondents.

Abdul Malik Ishak J:

Facts

The appellant, a jewellery businessman, averred in his statement of claim that on 15 February 1993 at 5.30pm a police party headed by the second respondent, one Inspector Ramli bin Mokhtar, conducted a search in the appellant's factory purportedly suspecting that the appellant had kept a stolen gold locket there. The appellant had shown to the second respondent a receipt of sale dated 9 February 1993 from Golden Jewelleries marked as exh (P1) but the second respondent was not satisfied, perhaps because it was written in the Chinese characters and he was unable to understand it, and so he took no chances and he brought the appellant to the central police station in Johor Bahru for further investigations. The appellant was eventually taken to Tampoi police station and detained there for the night. The next day, on 16 February 1993, the appellant was once again taken to his factory under police escort for the purpose of opening the steel safe that was purportedly used to keep the stolen gold locket and this time round the appellant had his hands handcuffed. The appellant's workers were there and they saw this incident and for that reason the appellant was said to be embarrassed. The steel safe was duly opened and the gold locket was not found therein. The appellant was then released on a bail bond in the sum of RM5,000. The appellant alleged that between 15 February 1993 to 16 February 1993, the respondents had committed criminal trespass, false imprisonment and had defamed the appellant. All these were said to have caused material loss and mental anguish to the appellant.

The second respondent in his statement of defence denied that he had no legal authority to enter the appellant's factory and he emphasised that the actions which he took were governed by the provisions of the Criminal Procedure Code (FMS Cap 6) ('CPC') after receiving credible information or having reasonable cause for suspecting that the appellant had concealed stolen property or in possession of stolen property which was related to Skudai report 1985/93 as reflected in exh (D3). The second respondent too put up the defence that the appellant was handcuffed for security reasons and following the procedures as set out by the law thereto. The respondents too averred that they had discharged their duties according to the powers vested in them under the law and that they had no intention whatsoever to embarrass nor ridicule the appellant.

All these were the brief facts that can be gleaned from the pleadings. The appellant took the stand before the learned sessions court judge in the person of Madam Siti Mariah bt Hj Ahmad and this was what he testified. He said that the police party headed by the second respondent visited his factory on that fateful day — 15 February 1993 at 5.30pm and the second respondent told him that the police wanted to search his factory because the police suspected that he kept stolen property. During that visit, the police party was accompanied by Khoo Siew See (DW3) ('Khoo') — a businessman who transacted and dealt in gold items and it was Khoo who had sold the gold locket to the appellant. The appellant testified under oath

A that he had shown a cash sale issued by Khoo and marked as exh (P1) to the second respondent but the latter directed him to take out all the gold items from the steel safe. The appellant then told the second respondent that he would open the steel safe on the next day at 9.00am and because of that the appellant was taken to the central police station for further investigations and for his statement to be recorded. After the appellant's B statement had been recorded, he was then taken at about 7.30pm by the second respondent to the appellant's factory particularly at the main office for further investigations. There the police took down the particulars of the appellant's workers. According to the appellant, since the police did not find anything incriminating he was then taken to the Tampoi police station to be C detained. On the next day at about 8.30am with his hands handcuffed, the appellant was brought once again to his factory. In the factory, so the appellant testified, there were a lot of workers and they witnessed that incident — particularly the fact that the appellant was handcuffed. The appellant was then made to open the steel safe and upon opening the same nothing incriminating was found. To be exact no gold items were found D therein. The appellant was then brought to the central police station and there he was released on bail. According to the appellant, as a result of his detention he had lost his clients and several of his workers had stopped work. The appellant testified that he was emotionally disturbed. As a result of that ugly episode, the appellant ceased to become the vice chairman of the business community in Johor Bahru.

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Under cross-examination, the appellant testified that he only purchased gold from regular customers. When cross examined, the appellant initially said that he did not know the name of the person known as Khoo. But when the appellant was shown exh (P1), he reneged and said that he bought an item from Khoo on 9 February 1993 and Khoo had issued a cash sale F receipt. The appellant ventured to say that he knew the customer but he did not know the name of the customer. The appellant further testified that prior to the incident he had purchased other gold items from Khoo on five or six other occasions. It was in evidence that the second respondent had told the appellant that the latter was suspected of purchasing stolen gold jewellery. In the course of police investigations, the appellant had explained G that the steel safe could not be opened as the timer had been set. The appellant alleged that he had not been informed of the reasons for his arrest. Of significance to note was the fact that the appellant proudly declared to the whole world at large, so to speak, that he had previously, on one occasion, been detained by the police for possession of stolen items and he H had successfully sued the police.

I will now proceed to narrate the evidence adduced by the respondents.

Inspector Ramli bin Hj Mohd Amin (SDI) gave evidence for the respondents. He testified that on 2 February 1993 he received a police report marked as exh D3 in regard to a robbery involving jewellery items I and as a result of good police investigations two male Indians were arrested. It was in evidence that the investigation of the case was assisted by the second respondent. According to the second respondent, the police

investigations showed that one of the two male Indians sold a gold locket to Golden Jewelleries that was owned by Khoo. While giving evidence before the learned sessions court judge, Khoo unabashedly admitted purchasing that gold locket from the male Indian. Khoo in turn admitted selling the gold locket to Yuen Dong Jewelleries — the company belonging to the appellant. It was said that at 5.30pm on 15 February 1993, together with Khoo the second respondent proceeded to the appellant's factory. The second respondent introduced himself by showing his warrant card and he told the appellant that the factory needed to be searched as it was suspected of keeping stolen goods. After the search, the second respondent discovered that the appellant had conducted the business without a licence that was supposed to be issued by the municipality. Since the factory was about to be closed for the day, the second respondent caused the appellant to be taken to the central police station for further investigation. The second respondent testified that he proceeded to examine and search the appellant's factory on the strength of the information relayed to him by Khoo. The second respondent clarified and emphasised that when the appellant was questioned, the appellant could not remember nor knew about the items that were sold to the appellant by Khoo. The second respondent further explained that even though Khoo (and not the appellant) had shown the cash sale bill as reflected in exh (P1), yet the second respondent had no choice but to detain the appellant as the cash sale bill did not itemise the item that was received by Khoo. Furthermore, the cash sale bill was also in the Chinese characters. The next day at about 8.30 am, so the testimony of the second respondent continued, the appellant was escorted to his factory and there the appellant was directed to open the steel safe. Once the steel safe was opened nothing incriminating was found and so the appellant was released on bail. According to the second respondent, the appellant was detained as he was suspected of being involved in a syndicate that purchased stolen jewelleries. The second respondent explained that he did not apply for a search warrant because the stolen gold locket was an article that could easily be removed and destroyed. According to the second respondent, after the appellant was arrested, there was a need to handcuff the appellant for security reasons and also the need to comply with the relevant provisions pertaining to detention.

Under cross-examination, the second respondent stood firm and he maintained his version throughout. It was put to the second respondent that the appellant was not told about the reasons for his arrest and this was categorically denied by the second respondent. The second respondent let loose a salvo when he testified that the appellant was uncooperative when the police was investigating him. The second respondent denied that the police had purposely and by design sought to embarrass the appellant by handcuffing the appellant soon after his arrest.

The evidence of Khoo was short and sweet. He testified that he purchased the gold locket from one male Indian suspect in regard to the robbery case that took place in Skudai. On 9 February 1993, Khoo sold that particular gold locket and other articles to the appellant and that Khoo had issued a cash sale bill as per exh P1.

A On these set of facts, the appellant sought before the learned sessions court judge the following:

(i) damages against both the respondents and/or against one of the respondents;

(ii) interest at the rate of 8% per year for the quantum awarded from the B date of the summons till the date of settlement;

(iii) costs of the action; and

(iv) any other relief which are fair and reasonable as the court thinks fit.

The learned sessions court judge dismissed the appellant's claim with costs. C Her grounds of judgment can be seen at pp 74–90 of the records of appeal. Being dissatisfied, the appellant appealed to this court.

Mr Mohamed Hanipa bin Maidin, learned counsel for the appellant, was quite magnanimous. He abandoned the issue of defamation and focussed his attention to three main issues, namely:

D (1) Whether the appellant was legally arrested?

(2) Was there unlawful imprisonment and criminal trespass occasioned by the second respondent?

(3) Was the search without warrant proper in the circumstances?

I will now examine these three main issues in the context of the facts of the E present appeal.

First issue

The word 'arrest' is not defined in the CPC nor at common law. But s 15(i) of the CPC sets out the manner in which an arrest ought to be made. It F enacts that in making an arrest the police officer or other person making the arrest shall actually touch or confine the body of the person to be arrested unless there be a submission to the custody by word or action. *Spicer v Holt* [1976] RTR 389 at p 400 had this to say in regard to the word 'arrest':

> Arrest is an ordinary word. Whether or not a person has been arrested depends G not on the legality of the arrest but on whether he has been deprived of the liberty to go where he pleases.

In my judgment, s 15(i) of the CPC imposes a burden, nay a compulsory burden on the person making the arrest to 'touch or confine' the body of the person who is being arrested unless the arrested person submits to the arrest H by word or conduct. In *U Thwe v A Kim Fee* AIR 1930 Rang 131 at p 132, the court there held that actual contact is necessary when effecting an arrest. Lord Devlin in *Shaaban & Ors v Chong Fook Kam & Anor* [1969] 2 MLJ 219 (PC) remarked at p 220 that:

> An arrest occurs when a police officer states in terms that he is arresting ... .

I The English common law empowers a mere constable to arrest when he finds the culprit committing a felony, or upon reasonable suspicion that a felony has been committed by the culprit although no felony has, in fact, been committed. Whether reasonable grounds of suspicion really existed

would entirely be matters within the domain of the constable's knowledge and it can even be derived from facts stated to the constable by other people (*Beckwith v Philby* 6 B & C 635; *Davis v Russell* 5 Bing 354; *Hogg v Ward* 27 LJ Ex 443; and *Marsh v Loader* 14 CBNS 535). The case of *Timothy v Simpson* 1 Cr M & R 757 lays down a simple proposition of law: a constable may arrest any person who in his presence commits a misdemeanour or a breach of the peace. A constable too may effect an arrest at the time when or immediately after the offence is committed (*Fox v Gaunt* 3 B & Ad 798). An arrest by the constable may be carried out while there is a danger that the offence may be renewed by the culprit (*R v Walker* 23 LJMC 123).

In India, a fertile ground for legal dissent, it has been decided in *Aludomal v Emperor* 17 Cr LJ 87 that there will be no arrest when an arresting officer tells a person on the street that he is under arrest, and the person simply walks away. Of course, if one applies *Shaaban*'s principles there would be an arrest under those circumstances. Lord Simmonds in *Christie & Anor v Leachinsky* [1947] AC 573 at p 600 aptly said that an arrest is the beginning of imprisonment. Thus, an arrest would be to restrain the movement of a person's body. I even venture to say that words may amount to arrest if, in the circumstances of the case, they are simply calculated to bring to the person's notice that he is under compulsion and that person submits to the compulsion (*Halsbury's Laws of England* (4th Ed) Reissue at p 517 of para 693). At this juncture, it would be ideal to distinguish the word 'custody' from the word 'arrest' because a person may be in custody without necessarily having been arrested. Thus, being in custody can never be equated with an arrest. The difference is certainly crucial especially when one wants to determine the exact time of arrest. It must not be forgotten that a person may be watched or his liberty may be restricted without there being an arrest at all (*Emperor v Madar* (1885) All Co N 59). The court in *Harbansingh Sardar Lanasingh v State* AIR 1970 Bom 79 decided that when a person drives away accompanied by several officers of the law in his car, there is no arrest at all. It is merely the placing of that person in the custody of those officers. The magic phrase 'submission to the custody by word or action' appearing in s 15(i) of the CPC has given rise to the following interpretations:

(a) accompanying a police officer to a police station on his direction may amount to a submission to custody (*KN Cheriyon v Johnson* [1969] Mad LJ (Cr) 765);

(b) accompanying a police officer into a van and agreeing to stay overnight at a particular residence may amount to a submission to custody (*Paramhansar v State* AIR 1964 Ori 144; and *State of Uttar Pradesh v Deoman* AIR 1960);

(c) When the suspect is being watched and later taken by a customs officer in the suspect's car, that may amount to a submission to custody (*Roshan Beevi v Joint Secretary of Tamil Naidu* (1984) Cr LJ 134 (Mad));

(d) a submission to custody may arise where a person is shown an authority card by a police officer (*PP v Tan Seow Chuan* [1985] 1 MLJ 318); and

(e) a submission to custody may also arise when a person is accompanied and escorted by police officers from the bus he has been travelling to a room at a police station (*PP v Johari bin Abdul Kadir* [1987] 2 CLJ 66).

Be that as it may, *Shaaban*'s case lays down the following propositions of law: that an arrest occurs when a police officer makes it clear that he will, if necessary, use force to prevent the individual from going where he may want to go. That being the case, s 15(i) of the CPC renders it totally unnecessary for the arresting officer to actually touch or confine the body of the person sought to be arrested *provided* the person submits to the custody by word or action. The Court of Appeal in the case of *R v Inwood* [1973] 2 All ER 645 at p 649 held that there was no particular formula to follow in order to determine whether a person has been arrested; what was important, so the court held, was to look at the circumstances of the case and decide accordingly.

Section 23 of the CPC gives the power to a police officer to arrest without a warrant. Paragraphs (a) to (k) of s 23(i) of the CPC set out the situations wherein arrests without a warrant may be made by police officers. For the purpose of this judgment, reference to para (a) of s 23(i) of the CPC must be made and incidentally it is the provision most resorted to by lawyers in this country. Paragraph (a) of s 23(i) of the CPC enacts as follows:

> (i) Any police officer or penghulu may without an order from a Magistrate and without a warrant arrest —
>
> (a) any person who has been concerned in [any offence committed anywhere in Malaysia which is a seizable offence under any law in force in that part of Malaysia in which it was committed] or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned; ...

and clearly from the tenor of this provision, an arrest may be made in relation to any seizable offence committed in any part of Malaysia. Thus, any person may be arrested if he 'has been concerned' in any offence; or 'against whom a reasonable complaint has been made'; or 'against whom credible information has been received'; or 'against whom a reasonable suspicion exists'. Such offences would certainly be seizable offences committed within Malaysia. Section 2(i) of the CPC defines 'seizable offence' to mean:

> an offence which and 'seizable case' means a case in which a police officer may ordinarily arrest without warrant according to the third column of the First Schedule

and the word 'complaint' is defined in s 2(i) of the CPC to mean:

> that allegation made orally or in writing to a Magistrate with a view to his taking action under this Code that some person whether known or unknown has committed or is guilty of an offence.

In *Tan Kay Teck & Anor v The Attorney General* [1957] MLJ 237, Whyatt CJ applied the objective test to determine whether a complaint was

reasonable or otherwise. This was what his lordship said at p 238 of the report:

> The essence of the matter is that a police officer is entitled to arrest a person without warrant if he has received a reasonable complaint that such person has been concerned in an offence under s 347 of the Penal Code.

As to what would amount to reasonable suspicion, reference to four cases should be made. The first would be the case of *Tan Eng Hoe*, reported as *In the matter of the petition of right of Tan Eng Hoe (petitioner) v The Attorney General of the Straits Settlements* [1933] MLJ 15, where the brief facts may be stated as follows. A report of cheating had been lodged. The applicant's habits and movements answered the description given of those of another person against whom that report of cheating was lodged. The applicant was arrested. Further investigation revealed that he was not the offender which the police was looking for. The court held that since the circumstances were such that any reasonable man would have fairly suspected the applicant to be the person who had committed the offence complained of, the police were said to be justified in arresting him. Whitley J delivering the judgment of the court had this to say at p 153 of the report:

> The principles by which the court should be guided in deciding what is reasonable cause of suspicion to justify arrest are to be gathered from a number of cases. A belief honestly entertained is not of itself enough. 'The defendant must show facts which would create a reasonable suspicion in the mind of a reasonable man ' (per Lord Campbell, CJ in *Bronghton v Jackson* (1852) 18 QB 378).
>
> As Tindall CJ put it to the Jury very clearly in *Allen v Wright* 173 ER 302: 8 Carr & P 525:
>
> > 'The only two points upon which you must be satisfied before you can find a verdict for the defendant are first that a felony had actually been committed; that some person or other had stolen the feathers and second that the circumstances were such that you yourself or any reasonable person acting without passion or prejudice would have fairly suspected the plaintiff of being the person who did it. If you think the circumstances were such you will find your verdict for the defendant.'
>
> A man is not bound to wait until he is in possession of such evidence as would be admissible and sufficient for prosecuting the offence to conviction or even of the best evidence which he might obtain by further inquiry. To quote Bramwell B in *Perryman v Lister* (1868) LR Ex at p 202: 'It does not follow that because it would be very reasonable to make further inquiry it is not reasonable to act without doing so.' Furthermore, as stated in *Pollock on Torts* (12th Ed) at p 224, it is obvious that the existence or non-existence of reasonable cause must be judged not by the event but by the party's means of knowledge at the time.
>
> Applying these principles to the present case it seems to me that the grounds upon which the police arrested the petitioner were grounds upon which a reasonable man would have acted.

The second case would be that of *Ramly & Ors v Jaffar* [1968] 1 MLJ 209 FC a decision of the then Federal Court. In that case, the appellants appealed against the decision of the High Court which had awarded

damages for wrongful arrest. The respondent had been arrested based on a statement made by a person known as Zakaria. The learned trial judge had held that the statement made by Zakaria to the police was neither a credible information nor did it give rise to a reasonable suspicion against the respondent within the meaning of s 23(i)(a) of the CPC. The then Federal Court held that the question whether there was a reasonable and probable cause must be determined objectively on the evidence before the court and using this simple approach, the then Federal Court further held that there was reasonable suspicion that the respondent was concerned in a seizable offence and that being the case the arrest was said not to be wrongful and the appeal was allowed. Azmi CJ (Malaya) delivering the judgment of the then Federal Court (Azmi CJ (Malaya), Ismail Khan and MacIntyre JJ) had this to say at pp 210–211 of the report:

> In deciding these questions the judge had applied what he called the objective test as explained by Lord Goddard in *Tims v John Lewis & Co* [1951] 2 KB 472. Lord Goddard said this:
>
> > 'The question whether there was a reasonable or probable cause is not, I think, to be determined subjectively as has been suggested. It is a question which objectively the court has to decide on the evidence before it.'

The third case would be that of *Shaaban* where the Privy Council drew a distinction between prima facie proof and that of reasonable suspicion. Lord Devlin in a well reasoned judgment had this to say at p 221 of the report:

> Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove'. Suspicion arises at or near the starting-point of an investigation of which the obtaining of prima facie proof is the end. When such proof has been obtained, the police case is complete; it is ready for trial and passes on to its next stage. It is indeed desirable as a general rule that an arrest should not be made until the case is complete. But if arrest before that were forbidden, it could seriously hamper the police. To give power to arrest on reasonable suspicion does not mean that it is always or even ordinarily to be exercised. It means that there is an executive discretion. In the exercise of it many factors have to be considered besides the strength of the case. The possibility of escape, the prevention of further crime and the obstruction of police enquiries are examples of those factors with which all judges who have had to grant or refuse bail are familiar. There is no serious danger in a large measure of executive discretion in the first instance because in countries where common law principles prevail the discretion is subject indirectly to judicial control. There is first the power, which their Lordships have just noticed, to grant bail. There is secondly the fact that in such countries there is available only a limited period between the time of arrest and the institution of proceedings; and if a police officer institutes proceedings without prima facie proof, he will run the risk of an action for malicious prosecution. The ordinary effect of this is that a police officer either has something substantially more than reasonable suspicion before he arrests or that, if he has not, he has to act promptly to verify it. In Malaysia the period available is strictly controlled by the Code. Under s 28 the suspect must be taken before a magistrate at the latest within 24 hours. If the investigation cannot be completed in 24 hours and there are grounds for believing that the

accusation or information is well founded, under s 117 the magistrate may order the detention of the accused for a further period not exceeding 15 days in the whole. By allowing 15 days after arrest for investigation, the Code shows clearly that it does not contemplate *prima facie* proof as a prerequisite for arrest. A

The test of reasonable suspicion prescribed by the Code is one that has existed in the common law for many years. The law is thus stated in *Bullen and Leake* (3rd Ed) p 795, the 'golden' edition of 1868: B

> 'A *constable* is justified in arresting a person without a warrant, upon a reasonable suspicion of a *felony* having been committed and of the person being guilty of it.'

Their Lordships have not found any English authority in which reasonable suspicion has been equated with prima facie proof. In *Dumbell v Roberts & Ors* [1944] 1 All ER 326, Scott LJ said at p 329: C

> 'The protection of the public is safeguarded by the requirement, alike of the common law and, so far as I know, of all statutes, that the constable shall before arresting satisfy himself that there do in fact exist reasonable grounds for suspicion of guilt. That requirement is very limited. The police are not called upon before acting to have anything like a prima facie case for conviction; ... .' D

There is another distinction between reasonable suspicion and prima facie proof. Prima facie proof consists of admissible evidence. Suspicion can take into account matters that could not be put in evidence at all. There is a discussion about the relevance of previous convictions in the judgment of Lord Wright in *McArdle v Egan* (1934) 150 LT 412. Suspicion can take into account also matters which, though admissible, could not form part of a prima facie case. Thus the fact that the accused has given a false alibi does not obviate the need for prima facie proof of his presence at the scene of the crime; it will become of considerable importance in the trial when such proof as there is being weighed perhaps against a second alibi; it would undoubtedly be a very suspicious circumstance. E F

The fourth case would be a case decided in 1974. That would be the case of *Mahmood v Government of Malaysia & Anor* [1974] 1 MLJ 103 where the facts were quite interesting. The plaintiff in that case alleged that he was unlawfully and negligently shot at and wounded by a police officer while he was at the Lake Gardens. The defence was that when the police officer fired the shots he was lawfully discharging his police duties to prevent the plaintiff from escaping from the scene where the offence was reasonably suspected to have been committed. It was held that, on the evidence, the plaintiff had failed to prove his allegations that he had been shot by the police officer negligently and without warning. It was also held that in the circumstances the police officer was not negligent and was justified as a last resort to fire the shot to effect the plaintiff's arrest and prevent him from escaping. Yong J at p 107 of the report had this to say: G H

> After examining these and other authorities I come to the conclusion that if there exist sufficient grounds to raise a reasonable suspicion in the minds of a police officer that (i) a seizable offence has been committed; and that (ii) the persons seen running away from the scene are concerned in its commission, he may arrest them, and may after disclosing his police identity and after I

A issuing the necessary warnings take all steps including the use of firearms as a last resort, to prevent them from escaping. Should such persons in attempting to escape ignore such warnings and are injured they have themselves to be blamed. A police officer cannot however use more force than is necessary to effect their arrest or capture nor can he cause their death unless the alleged offence is one punishable with death or imprisonment for life. The question B whether there existed sufficient grounds to raise such a reasonable suspicion, is a question for the court to decide.

The words 'credible information' appearing in para (a) of s 23 (i) of the CPC must be construed widely. It means any information which the police officer in the exercise of his judgment appears entitled to act in the C particular circumstances of the case. There must however be material for the police officer to act on that credible information. Harun J (who later rose to be SCJ) in *Hashim bin Saud v Yahaya bin Hasim & Anor* [1977] 1 MLJ 259 had occasion to decide on the meaning behind the words 'credible information.' That was a case where the plaintiff claimed damages for wrongful detention and denial of right to consult counsel. The plaintiff D had been arrested on 8 August 1972 on suspicion of being involved in the theft of an electricity generator. On 9 August 1972 as the investigations were not completed, the plaintiff was produced in court and an application made for his further detention till 19 August 1972. The plaintiff was released on 14 August 1972. The plaintiff was not allowed to see counsel during the period of his detention when police investigations were in E progress. It was held, inter alia, that on the facts the arrest of the plaintiff was lawful as there was reasonable suspicion that the plaintiff was concerned with the theft. It followed that his subsequent detention by the police before production before the magistrate and subsequently by the special order of the magistrate was legal. It was also held that where a person is lawfully detained, his detention does not become unlawful if the police F deny that person his right to consult and be defended by a legal practitioner of his choice. At p 260 of the report, his lordship Harun J (who later rose to be SCJ) aptly said:

> I now deal with the two aspects of this case. Firstly, the arrest of the plaintiff and his detention by the police from 10.00am on 8 August 1972 to 9.50am on G 9 August 1972. The theft of the electricity generator from the pump house is an offence under s 380 of the Penal Code and is categorized as a 'seizable offence' in the First Schedule to the CPC: s 2 CPC. This means that a police officer may arrest any person who has been concerned in the theft without a warrant. Section 23(i)(a) of the CPC provides:
>
> H (i) any police officer or penghulu may without an order from a Magistrate and without a warrant arrest —
>
> (a) any person who has been concerned in any offence committed anywhere in Malaysia which is a seizable offence under any law in force in that part of Malaysia in which it was committed or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his I having been so concerned;
>
> In this case, there was a police report of the theft — No 461/69. There was credible information against the plaintiff in that the source had previously

proved to be reliable in the sense that information given by this source had led to arrests, prosecutions and convictions. And finally the gist of the information given on 5 August 1972 to Inspector Yahaya concerning the plaintiff was sufficient to arouse the suspicion of any reasonable person that the plaintiff was concerned with the theft. The test of reasonable suspicion to be applied in a case like the present is dealt with by the Privy Council in *Shaaban & Ors v Chong Fook Kam & Anor* [1969] 2 MLJ 219 and I am satisfied that the arrest of the plaintiff was in accord with that test and was lawful. It follows that his subsequent detention by the police under s 28 of the CPC was also lawful as investigations were in progress and the plaintiff was produced before a Magistrate within 24 hours of his arrest. His subsequent detention up to 14 August 14 1972 is clearly lawful as it was by a special order of a Magistrate under s 117 CPC: see the decision of the Federal Court in *Chong Fook Kam & Anor v Shaaban & Ors* [1968] 2 MLJ 50.

It is germane at this juncture to refer to two Indian cases. Both the cases of *Charu Chandra* AIR 1917 Cal 253 and *Roshan Lal Goel v Superintendent, Central Jail, Lashkar* AIR 1950 MB 83 laid down the following principles of law: that credible information or reasonable suspicion must be based on definite facts and must at least be founded on some definite fact tending to show suspicion on the arrested person.

So much for the law.

I will now apply the law to the facts of the present appeal. Mr Rosli Kamaruddin, learned Federal Counsel, rightly submitted that the appellant was legally detained under the law. He stressed and laid emphasis on the facts of the present appeal. It must be recalled, after perusing through the appeal record, that there was a robbery at No 25, Jln Timah 8, Taman Sri Putri, Skudai on 1 February 1993 at about 7.50pm and as a result of that a police report was lodged by Arunachalam a/l Guana Prakasam in exh D3. That police report in exh D3 was worded thus:

> Pada jam 1/kurang 7.50pm 1.2.93 saya serta keluarga semasa berada di rumah No 25 Jalan Timah 8, Taman Sri Putri Skudai, pintu depan dan pagar depan tutup serta pintu belakang terbuka kerana isteri hendak jemur pakaian. Tiba-tiba lima lelaki India menyerbu masuk ke dalam rumah melalui pintu belakang, semuanya bersenjatakan pisau 'Rambo'. Salah seorang memegang adik perempuan saya acu pisau. Dua orang lagi memegang saya juga acu pisau dan tanya mana bilek saya seorang lagi pegang anak lelaki saya. Kemudian tiga orang lelaki tersebut bawa saya naik ke atas rumah. Dua orang lagi berada di bawah mengikat tali salotape pada adik perempuan saya. Semasa di atas seorang ikat isteri saya, dua orang lagi yang menjaga saya tanya mana barang emas dan saya pun tunjuk dalam almari dan ikat tangan dan mulut saya. Setelah ambil barang emas dan barang lain termasuk wang kemudian memasukkan ke dalam beg saya, dan ambil sebuah video dan handphone, tiga orang lagi terus lari keluar ikut pintu belakang, 2 orang lagi ikut pintu hadapan hendak ambil m/kar saya. Masa itu, saya turun ke bawah rumah semasa dalam m/kar salah seorang hidupkan enjin m/kar. Seorang lagi masuk semula ikut pintu belakang, saya pun ambil parang panjang dan tetak pada kepala lelaki tersebut dan terus larikan diri. Kemudian dua lagi dalam m/kar turut melarikan diri panjat pagar. Dalam kejadian ini saya serta keluarga tiada cedera apa-apa. Barang-barang yang diambil (1) Wang tunai SD5,000; (2) Satu bentuk cincin berlian jari saya harga SD1800; (3) Satu rantai leher

A emas dari leher saya harga SD1000; (4) Dari isteri saya 2 cincin emas, 4 bangle emas, 2 rantai kaki emas dan seutas rantai tangan emas harga SD8,000; (5) Sebuah video jenis National no. siri: Tidak ingat harga RM2,200, dan adik perempuan saya seutas rantai emas RM400. Kerugian RM18,400.

B The police acted swiftly. The second respondent arrested two suspects:

(1) Francis a/l Sinnu; and

(2) Marie a/l Subramaniam.

and police reports pertaining to these two arrests were lodged by the second respondent as reflected in exhs D4 and D5 of the appeal record. Under C interrogation, Francis a/l Sinnu spilled the beans. Through him, the police came to know that the gold locket was sold to Golden Jewelleries, a company owned by Khoo. The police then nabbed Khoo and he admitted selling the gold locket to Yuen Dong Jewelleries, a company belonging to the appellant. On 15 February 1993 at 5.30pm, the second respondent D proceeded to Yuen Dong Jewelleries and carried out the necessary investigations under s 411 of the Penal Code — an offence of dishonestly receiving stolen property. The First Schedule to the Penal Code classifies an offence under s 411 of the Penal Code as an offence where the police may arrest without warrant. A seizable offence, and the second respondent was certainly empowered to arrest any person including the appellant who has E been concerned in dishonestly receiving stolen property. In the course of investigating the premises of the appellant, the focus of attention was the gold locket. That investigation revealed that the appellant had bought the gold locket from Khoo and the appellant was unable to assist the police in regard to the details of what he had bought from Khoo. Even the receipt in exh (P1) written in Chinese characters was of no help to the appellant. It F appeared to the second respondent that the gold locket that was purchased by the appellant from Khoo was kept in the steel safe of the appellant's premises. What should the second respondent do? The answer was indeed simple. The second respondent requested the appellant to open the steel safe. It was a simple and a reasonable request but the appellant could not accede to the request because according to him the steel safe could not be G opened until 9.00am the next day. The appellant also informed the second respondent that no one could open the steel safe except himself. The appellant even boasted that his own wife could not open the steel safe. The appellant emphasised that the steel safe was already set to open according to the time as set by him. The second respondent, being a good police H officer, had no choice but to escort the appellant to the police station for further investigations and in the process of which the appellant was detained for the duration of 15 hours from 5.30pm on 15 February 1993 to 8.30am on 16 February 1993. In my judgment, in effecting the arrest on the appellant the second respondent was justified in doing so. What the second respondent did was clearly within the purview of para (a) of s 23(i) of the I CPC. The appellant proudly proclaimed that he was the only one who could open the steel safe and this must have prompted the second respondent to detain the appellant overnight. Indeed in his testimony the

second respondent testified that he told the appellant that the appellant's premises would be examined because it was suspected of keeping stolen goods. Khoo relayed the message that the gold locket was sold to the appellant and the second respondent suspected that the appellant kept the gold locket. This was what the second respondent said in examination in chief (the translated version, while the Bahasa Malaysia version can be seen at p 43 of the appeal record):

> I suspected Yong to keep the gold locket based on the information of Khoo Siew See.

The appellant was not cooperative at all. When the appellant told the second respondent that the steel safe could not be opened, that it had been set to open at 9.00am the next day, that if the steel safe was opened an alarm would be sounded – all these cumulatively made the second respondent to escort the appellant back to the police station and, upon arrival, the second respondent informed his superior officer in the person of DSP Zakaria and the second respondent even told all these to the investigating officer one Inspector Ramli bin Hj Mohd Amin (SDI)) (see p 45 of the appeal record). The appellant was even detained at Tampoi lockup, a good lockup as compared to the other lockups and this was the undisputed version of the second respondent. As a suspect under investigation for an offence under s 411 of the Penal Code, the appellant was given a VIP treatment by the police. According to the second respondent, the appellant was told of the reasons for his detention. In the words of the second respondent at p 45 of the appeal record:

> Semasa ditahan, kami beritahu Yong sebab ditahan kerana kami mahu mencari barang kes rantai emas dan kedua kerana peti besi tidak boleh dibuka — hanya dibuka pada jam 9.00 pagi.

This immediately brings to mind, in the forefront, the classic case of *Christie & Anor v Leachinsky* which categorically laid down the principle of law to the effect that an arrest without warrant, either by a policeman or by a private person, can be justified only if it was an arrest on a charge which was made known to the person arrested unless the circumstances were such that the person arrested must know the substance of the alleged offence. At pp 587 to 588 of the report, Viscount Simon had this to say and it must surely be the barometer to apply in dealing with cases of this nature:

> These citations, and others which are referred to by Lord Du Parcq, seem to me to establish the following propositions:
>
> (1) If a policeman arrests without warrant upon reasonable suspicion of felony, or of other crime of a sort which does not require a warrant, he must in ordinary circumstances inform the person arrested of the true ground of arrest. He is not entitled to keep the reason to himself or to give a reason which is not the true reason. In other words, a citizen is entitled to know on what charge or on suspicion of what crime he is seized.
>
> (2) If the citizen is not so informed, but is nevertheless seized, the policeman, apart from certain exceptions, is liable for false imprisonment.
>
> (3) The requirement that the person arrested should be informed of the reason why he is seized naturally does not exist if the circumstances are

such that he must know the general nature of the alleged offence for which he is detained.

(4) The requirement that he should be so informed does not mean that technical or precise language need be used. The matter is a matter of substance, and turns on the elementary proposition that in this country a person is, prima facie, entitled to his freedom and is only required to submit to restraint on his freedom if he knows in substance the reason why it is claimed that this restraint should be imposed.

(5) The person arrested cannot complain that he has not been supplied with the above information as and when he should be, if he himself produces the situation which makes it practically impossible to inform him, eg by immediate counter-attack or by running away.

The second respondent further gave an acceptable reason as to why the appellant was detained. At p 46 of the record of appeal, the second respondent testified:

S: Kenapa perlu ditahan?

J: Kalau saya lepas mungkin beliau boleh membuka peti besi. Cuma beliau saja yang tahu membuka. Isteri beliau tidak tahu.

Khoo too was detained. This was what the second respondent said as seen at p 46 of the appeal record:

Khoo Siew See juga turut ditahan. Saya letak beliau di lokap Sentral.

In my judgment, the appellant was concerned in a seizable offence — as offence under s 411 of the Penal Code. A reasonable complaint in the form of a police report was made by Arunachalam a/l Guana Prakasam in exh D3 and credible information pertaining to the gold locket was provided by Khoo which information linked the appellant to the gold locket. In the mind of the second respondent, a reasonable suspicion existed as to the role of the appellant in the whole episode. There was thus sufficient basis for the second respondent to arrest the appellant and that arrest was legally effected within the provisions of the CPC. An argument was advanced that the complainant of the police report in exh D3, namely, Arunachalam a/l Guana Prakasam was not called and that failure was said to be fatal as it contravened s 114(g) of the Evidence Act 1950. When that police report was admitted and marked as an exhibit there was no objection at all by the appellant and using this as a leverage it was argued that as inadmissible evidence would remain throughout as such notwithstanding the failure to object to it initially. Section 114(g) of the Evidence Act 1950 refers to the presumption raised from wilful withholding of evidence and from spoliation, namely, destruction, mutilation or suppression or fabrication of evidence. The suppression or destruction of useful evidence leads to an inference that the evidence if produced would go against the party who withholds it. Here, the police report was produced and marked accordingly. The maker of that police report was not called. Was there a wilful withholding of evidence by the respondents in so far as the police report marked as D3 was concerned? Certainly not. It must be stressed that an adverse inference can only be drawn when there is a wilful withholding of evidence and not because of the failure to obtain evidence (*Srichand v S*, A

(1967) SCC 450). Would it be legitimate for me to draw an adverse inference for the failure of the respondents to call the complainant of the police report? Before the learned sessions court judge there was no foundation laid by the appellant through his counsel by eliciting evidence to show that the complainant of the police report was available at the time of the hearing and that being the case it was too late in the day for the appellant's counsel to ask this court, sitting in its appellate capacity, to draw an adverse inference against the respondents for non examination of the complainant of the police report (*Jagadishprasad v S* AIR 1970 Bom 166). The case of *Banwari v Mohesh* 45 IA 284; 24 CWN 577 laid down this principle of law which should be vigorously applied in favour of the respondents: no inference should be drawn against a party for not producing a material witness where the question of the absence of such witness was not raised at the trial at all. The absence of the complainant of the police report was not raised at all before the learned sessions court judge and so it was too late in the day for the appellant to raise the issue of adverse inference before me. It was my judgment and I do hold that it was not legitimate for me to draw an adverse inference against the respondents for the failure of calling the complainant of the police report.

Just imagine what would happen if the second respondent was not empowered under the law to arrest the appellant after it was discovered that the steel safe could not be opened on 15 February 1993. It would certainly hamper the smooth investigation of the case if the second respondent was barred from arresting the appellant. It must be recalled that the appellant admitted that he was the only person who could open the steel safe and if the appellant was not arrested at that crucial moment, there was a strong probability that the subject matter of the offence — the gold locket may disappear forever. After all, according to the second respondent the modus operandi of those people who stole gold items would be to melt the stolen gold items so as to prevent detection (see p 48 of the appeal record). It must be borne in mind that the second respondent suspected the appellant to be involved in an offence under s 411 of the Penal Code and that in law would empower the second respondent to arrest the appellant without a warrant.

For these reasons, the answer to the first issue would be in the positive. It was my judgment that the appellant was legally arrested.

Second and third issues

Since I have held that the appellant was legally arrested, the detention of the appellant was likewise lawful and, consequently, there was no unlawful imprisonment nor criminal trespass occasioned by the second respondent and this would be the answer to the second issue. At any rate, it would be ideal to consider the second issue together with the third issue.

The CPC provides for two types of search. One, on the body of the persons. Two, on the premises. The present judgment is only concerned with the second part. A search on the premises may be carried out with or without warrants and this would be entirely dependent on the circumstances. On the facts of the present appeal, the search was obviously

conducted without a search warrant. Section 62 of the CPC enacts as follows:

(i) If information is given to any officer of police not below the rank of Inspector that there is reasonable cause for suspecting that any stolen property is concealed or lodged in any place and he has good grounds for believing that by reason of the delay in obtaining a search warrant the property is likely to be removed, the said officer in virtue of his office may search in the place specified for specific property alleged to have been stolen.

(ii) A list of the property alleged to have been stolen shall be delivered or taken down in writing with a declaration stating that such property has been stolen and that the informant has good grounds for believing that the property is deposited in such place.

(iii) The person from whom the property was stolen or his representative shall accompany the officer in such search.

and the ingredients of this section may be stated as follows:

(a) any police officer not below the rank of Inspector must be in receipt of the information;

(b) the information gives rise to a reasonable cause for suspecting that any stolen property is concealed or lodged in any place;

(c) any police officer not below the rank of Inspector has grounds for believing that by reason of the delay in obtaining a search warrant the property is likely to be removed;

(d) a list of the property alleged to have been stolen shall be delivered or taken down in writing with a declaration stating that such property has been stolen and the informant has good grounds for believing that the property is deposited in such place.

(e) the person from whom the property was stolen or his representative shall accompany the officer in such search, and obviously the purpose for this exercise would be for the identification of the goods or property.

From the facts of the present appeal, there was strict compliance with ingredients (a), (b), and (c). Unfortunately, there was no compliance with ingredients (d) and (e) as stated above. Would the search be deemed illegal and what would be the effect of an illegal search?

The list of property that was alleged to have been stolen was not delivered to the appellant nor was the list produced in writing with a declaration to the effect that the property, namely, the gold locket, had been stolen and the informant, referring no doubt to Khoo, had good grounds for believing that the property was deposited in the appellant's premises. At the time of the search by the second respondent of the appellant's premises, the complainant – referring to the complainant of the police report marked as D3, was not present. The complainant's representative too was not present. Khoo was present at the time of the search. This brings to mind the case of *Kuruma v R* [1955] 1 All ER 236. That was an interesting case. The facts of that case may be stated thus. The appellant there was stopped by a police

constable and he was bodily searched. Under reg 29 of the Emergency Regulations of Kenya, any police officer of or above the rank of assistant inspector was authorised to stop and search any individual. On appeal to the Privy Council, the question that was posed was whether the evidence proving that the appellant was in possession of the ammunition had been illegally obtained and should not have been admitted. Lord Goddard CJ held that the test to be applied in considering whether the evidence was admissible was whether it was relevant to the matters in issue. If it was, it was admissible and the court was not concerned with how the evidence was obtained.

It must be emphasised that the case of *Saw Kim Hai & Anor v Reg* [1956] MLJ 21 applied and approved *Kuruma* in that the fact that the evidence was illegally obtained would not affect the question of its admissibility. In *PP v Seridaran* [1984] 1 MLJ 141, Peh Swee Chin J (who later rose as FCJ) applied *Kuruma* vigorously. In *Seridaran*'s case, the police had conducted an investigation without obtaining an order to investigate under s 108(2) of the CPC. The contention that the failure to obtain an order to investigate would render the evidence obtained by the police in such an investigation as illegal was rejected outright by Peh Swee Chin J (who later rose to be FCJ).

Now, applying *Kuruma*'s case had the search on the appellant's premises had been successful, the appellant would certainly be charged for an offence under s 411 of the Penal Code and if that was the scenario, this court would not be concerned as to the illegality of the search nor would this court be concerned as to how the evidence was obtained. I would proceed a step further in that, and this was my judgment, an illegal search by the police can never be construed to be a criminal trespass and the police would not be guilty of it. An illegal search, in the context of the present appeal, can never give rise to an unlawful imprisonment. The appellant was detained for 15 hours and there was no necessity to produce him before a magistrate for detention under s 117 of the CPC.

A search conducted by the police is an important aspect of the investigation process. A search is important as it will prevent the secretion of vital evidence. After the offending article is found, the seizure thereof would be useful as it would prevent the article from being destroyed.

The power to search must go hand in hand with the power to investigate (*State of Assam v Upendra Nath Rajkhown* [1975] Cr LJ 354 (Gauhati)). The case of *Elias v Pasmore* [1934] 2 KB 164 at p 172 laid down a classic principle of law. The court there took the view that 'the interest of the State in the person charged being brought to trial in due course necessarily extends as well to the preservation of material evidence of his guilt or innocence as to his custody for the purpose of trial.' That being the case when the second respondent took the appellant who was reasonably suspected of committing an offence under s 411 of the Penal Code to the appellant's factory, that was the right course of action for the second respondent to take. There was no need for the second respondent, at that point of time, to secure a warrant of search or take the appellant immediately to the police station or bring the appellant before a magistrate.

Obviously when the second respondent searched the premises of the appellant foremost in his mind was to locate the gold locket. Khoo told the second respondent that the gold locket was sold to the appellant and that gold locket was a subject matter of a robbery that took place earlier on. Without a search warrant, the second respondent proceeded to search the premises of the appellant with a view to avoid the destruction of the gold locket. There was evidence emanating from the second respondent that gold items can easily be melted away so as to avoid detection. Indeed, the appellant under cross-examination agreed that gold items which he obtained from his clients would be melted away. It was to prevent vital evidence from disappearing that the search was conducted without a search warrant. Was the second respondent justified in doing so? Section 62 of the CPC certainly empowers the second respondent to act in the manner in which he did.

Search by its very nature implies an act contrary to the will of the person whose premises is being searched. Section 62 of the CPC whittles down the right of an individual to prevent his premises from being searched. The legitimacy of the search without a warrant on the premises of the appellant by the second respondent can never be doubted. There was certainly a need to obtain, secure and preserve the evidence of a crime. Justice demands that the sanctity of a person's property be balanced with the need to maintain law and order. A high premium must be placed on the right of a police officer to conduct a search of one's premises in order to preserve evidence of a crime. Once a crime is perpetrated, search and seizure would be the most expedient form of investigation provided the information that is obtained gives rise to a reasonable cause for suspecting that any stolen property is concealed or lodged in any place. Here, the information relayed by Khoo motivated the second respondent to search the premises of the appellant. As a police officer, the second respondent has acted prudently and within the confines of the law. In my judgment, the search conducted on the premises of the appellant was a genuine effort that was aimed to preserve evidence of a crime that was said to have been committed by the appellant under s 411 of the Penal Code. Thus, when the second respondent entered the premises of the appellant to conduct the search there was no criminal trespass committed by the second respondent. Here was a police officer who carried out his duties in accordance with the law. Here was a police officer who took extra pains in ensuring that the appellant would be released within a span of 15 hours after the steel safe was opened and nothing incriminating was found therein. Here was a police officer who should be commended for his excellent investigative skills and not penalised for so doing. There was evidence emanating from the second respondent that the appellant was very uncooperative. The second respondent did say that had the appellant been cooperative, he would not be detained. Indeed, the appellant was swell headed. The appellant thought that he would be able to sue the Government of Malaysia together with the second respondent and be successful and be awarded damages, just like the last time when he was successful. But alas, all the facts were against the appellant. There was ample evidence before this court to conclude that the search was justifiable in the circumstances of the present appeal.

The case of *Mahadev Rai v King Emperor* AIR 1924 All 201 laid down a unique proposition of law. That case simply said that where there was a reasonable suspicion that the suspect had committed a seizable offence, the purpose of the entry was to effect an arrest, then that entry was said to be legal. It must be borne in mind that entering premises to effect an arrest cannot be said to be a search of the premises. But in exercising the power of arrest, a police officer may search and seize (*Dallison v Caffery* [1964] 2 All ER 610 at p 617). Here was a classic case of an arrest that was followed by a search with no seizure at all.

There were other minor issues that were raised in the course of the appeal and these issues were not material at all. There were no merits in these minor issues.

For the reasons adumbrated above, I would answer the third issue in the positive. I have no hesitation in dismissing this appeal with costs. The decision of the learned sessions court judge must be affirmed forthwith.

Appeal dismissed.

Reported by Jafisah Jaafar